Supreme Court, U.S.
FILED
FEB 22 2016
OFFICE OF THE CLERK

No. 15-6092

IN THE

Supreme Court of the United States

RICHARD MATHIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONER

JAMES WHALEN
FEDERAL PUBLIC DEFENDER'S OFFICE
Capital Square, Suite 340
400 Locust Street
Des Moines, IA 50309

DAVID M. LEHN
JOSHUA M. KOPPEL
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave. NW
Washington, DC 20006

MARK C. FLEMING
Counsel of Record
ERIC F. FLETCHER
WILMER CUTLER PICKERING HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
mark.fleming@wilmerhale.com

ALAN E. SCHOENFELD
WILMER CUTLER PICKERING HALE AND DORR LLP
7 World Trade Center
250 Greenwich St.
New York, NY 10007

QUESTION PRESENTED

Whether a predicate prior conviction under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1), must qualify as such under the elements of the offense simpliciter, without extending the modified categorical approach to separate statutory definitional provisions that merely establish the means by which referenced elements may be satisfied rather than stating alternative elements or versions of the offense.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

INTRODUCTION 1

OPINIONS AND ORDERS BELOW 3

JURISDICTION 3

STATUTORY PROVISIONS INVOLVED 3

STATEMENT 3

A. The Armed Career Criminal Act And The Categorical Approach 3

B. District Court Proceedings 6

C. Court Of Appeals Proceedings 10

SUMMARY OF ARGUMENT 12

ARGUMENT 15

I. THE MODIFIED CATEGORICAL APPROACH DOES NOT APPLY WHERE THE STATUTE OF CONVICTION SETS FORTH ALTERNATIVE MEANS OF COMMITTING A SINGLE CRIME, RATHER THAN ALTERNATIVE ELEMENTS, WHICH DEFINE DIFFERENT CRIMES 15

A. ACCA Focuses On The Prior Conviction's Elements, Not Its Underlying Facts 15

B. Means Are Legally Extraneous Facts, Not Elements 18

TABLE OF CONTENTS—Continued

Page

C. As The Court Recognized In *Descamps*, A Statute Listing Alternative Means Rather Than Alternative Elements Is Indivisible And Does Not Trigger The Modified Categorical Approach 21

D. Using The Modified Categorical Approach To Analyze Convictions Under Statutes Listing Alternative Means Would Raise Serious Constitutional And Practical Difficulties 25

1. The court of appeals' approach jeopardizes defendants' Sixth Amendment right to a jury trial 26

2. The court of appeals' approach raises serious practical and fairness concerns 27

II. IOWA'S OVERBROAD BURGLARY CRIME IS INDIVISIBLE, SO THE MODIFIED CATEGORICAL APPROACH DOES NOT APPLY 33

CONCLUSION 37

APPENDIX: Statutory Provisions Involved

18 U.S.C. § 924(e) 1a

Iowa Code § 702.12 (1989) 2a

Iowa Code § 713.1 (1989) 2a

TABLE OF AUTHORITIES

CASES

Page(s)

Alleyne v. *United States*, 133 S. Ct. 2151 (2013) 26

Almanza-Arenas v. *Lynch*, 809 F.3d 515 (9th Cir. 2015) 12, 24, 25, 36

Almendarez-Torres v. *United States*, 523 U.S. 224 (1998) 18

Apprendi v. *New Jersey*, 530 U.S. 466 (2000) 14, 26

Braverman v. *United States*, 317 U.S. 49 (1942) 19

Descamps v. *United States*, 133 S. Ct. 2276 (2013) ..... *passim*

Green v. *State*, 424 So. 2d 704 (Ala. Crim. App. 1982) 30

Griffith v. *Kentucky*, 479 U.S. 314 (1987) 7

Hamling v. *United States*, 418 U.S. 87 (1974) 18, 20

James v. *United States*, 550 U.S. 192 (2007) 8, 17, 27

Johnson v. *United States*, 135 S. Ct. 2551 (2015) 7, 10

Johnson v. *United States*, 559 U.S. 133 (2010) 5, 33

McCarthy v. *United States*, 394 U.S. 459 (1969) 21

Mellouli v. *Lynch*, 135 S. Ct. 1980 (2015) 5, 32

Moncrieffe v. *Holder*, 133 S. Ct. 1678 (2013) 5, 30

Mullaney v. *Wilbur*, 421 U.S. 684 (1975) 33

Murdock v. *City of Memphis*, 87 U.S. (20 Wall.) 590 (1875) 34

Musacchio v. *United States*, 136 S. Ct. 709 (2016) 36

TABLE OF AUTHORITIES—Continued

Page(s)

Nijhawan v. *Holder*, 557 U.S. 29 (2009) 5

Omargharib v. *Holder*, 775 F.3d 192 (4th Cir. 2014) 25

Padilla v. *Kentucky*, 559 U.S. 356 (2010) 31

Patterson v. *New York*, 432 U.S. 197 (1977) 18

Rendon v. *Holder*, 764 F.3d 1077 (9th Cir. 2014) 25

Richardson v. *United States*, 526 U.S. 813 (1999) 18, 21

Sanabria v. *United States*, 437 U.S. 54 (1978) 19

Schad v. *Arizona*, 501 U.S. 624 (1991) 13, 19, 20, 25, 33

Schriro v. *Summerlin*, 542 U.S. 348 (2004) 7

Shepard v. *United States*, 544 U.S. 13 (2005) 5, 8, 16, 29

State v. *Baker*, 560 N.W.2d 10 (Iowa 1997) 8

State v. *Berney*, 378 N.W.2d 915 (Iowa 1985) 29

State v. *Bratthauer*, 354 N.W.2d 774 (Iowa 1984) 35

State v. *Duncan*, 312 N.W.2d 519 (Iowa 1981) 15, 35

State v. *Hill*, 449 N.W.2d 626 (Iowa 1989) 8

State v. *Klawonn*, 609 N.W.2d 515 (Iowa 2000) 29

State v. *Pace*, 602 N.W.2d 764 (Iowa 1999) 8, 34

State v. *Rooney*, 862 N.W.2d 367 (Iowa 2015) 15, 34

State v. *Sanford*, 814 N.W.2d 611 (Iowa 2012) 34

Taylor v. *United States*, 495 U.S. 575 (1990) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page(s)

The Confiscation Cases, 87 U.S. (20 Wall.) 92 (1874) 19, 24

United States v. *Hess*, 124 U.S. 483 (1888) 18

United States v. *Howard*, 742 F.3d 1334 (11th Cir. 2014) 30, 35

United States v. *Lockett*, 810 F.3d 1262 (11th Cir. 2016) 12, 19

United States v. *Resendiz-Ponce*, 549 U.S. 102 (2007) 20

United States v. *Trent*, 767 F.3d 1046 (10th Cir. 2014) 25

STATUTES AND RULES

18 U.S.C.
§ 922 ..... 3, 6, 32
§ 924 ..... 1, 3, 7, 15, 16, 32

28 U.S.C. § 1254 3

Fed. R. Crim. P 7 20

Ala. Code
§ 13A-7-1 30
§ 13A-7-5 30
§ 13A-7-7 30

Iowa Code
§ 702.12 (1989) 8, 15, 33, 34, 35
§ 713.1 (1989) 8, 33

Iowa Ct. R.
Rule 2.4 29
Rule 2.5 29

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

Black's Law Dictionary (10th ed. 2014) 18

IN THE

Supreme Court of the United States

No. 15-6092

RICHARD MATHIS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

INTRODUCTION

The Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), provides for increased sentences for defendants who have "three previous convictions ... for a violent felony," defined to include "burglary." In determining whether a prior conviction qualifies as a predicate "burglary" offense for purposes of ACCA, this Court employs a "categorical" approach comparing the elements of the prior offense to the elements of the "generic" burglary offense encompassed by ACCA. If the offense of conviction sweeps more broadly than the generic crime, it is not a "categorical" match and cannot serve as an ACCA predicate. Although this Court has recognized a "modified categorical approach," which permits a sentencing court to look to certain records from the defendant's prior conviction to ascertain the offense, the modified approach is available only when

the statute of conviction is "divisible," meaning that it "sets out one or more *elements of the offense* in the alternative," "and so effectively creates 'several different ... crimes.'" *Descamps* v. *United States*, 133 S. Ct. 2276, 2281, 2285 (2013) (emphasis added).

In this case, the court of appeals erroneously applied the modified categorical approach to convictions under an Iowa statute that lists "several different methods of committing one offense," rather than different elements. *Descamps*, 133 S. Ct. at 2285 n.2. The court of appeals did this because it misread two sentences in a footnote in *Descamps* so as to conclude that "the means/elements distinction ... was explicitly rejected" by this Court. JA17. The result was that Petitioner Richard Mathis's sentence was enhanced based on a judicial determination of the *facts* of his prior conduct, rather than the elements of the offense of *conviction*. That ruling is contrary to ACCA and everything this Court has instructed about the "limited function" of the modified approach. *Descamps*, 133 S. Ct. at 2283. It also revives the very constitutional, practical, and fairness concerns that led Congress and this Court to adopt a categorical approach to enhanced sentencing in the first place.

Once the correct analysis is conducted, it is plain that Mr. Mathis was convicted under an Iowa burglary law that defines a single offense and is accordingly indivisible. It is also undisputed that the Iowa burglary offense is broader than generic burglary. As a result, Mr. Mathis's prior burglary convictions cannot serve as ACCA predicate offenses. The judgment should accordingly be reversed and the case remanded for resentencing.

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (JA7) is reported at 786 F.3d 1068. The order denying rehearing (JA22) is unpublished but is available at 2015 U.S. App. LEXIS 10632. The amended judgment of the United States District Court for the Southern District of Iowa (JA36) is unreported.

JURISDICTION

The court of appeals entered judgment on May 12, 2015, and denied a timely petition for panel and en banc rehearing on June 23, 2015. JA3. The petition for a writ of certiorari was timely filed on September 15, 2015, and granted on January 19, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Armed Career Criminal Act, 18 U.S.C. § 924(e), and Iowa Code §§ 702.12 and 713.1 (1989) are reproduced in the Appendix to this brief.

STATEMENT

A. The Armed Career Criminal Act And The Categorical Approach

A defendant convicted of being a felon in possession of a firearm is ordinarily subject to a maximum sentence of ten years' imprisonment. 18 U.S.C. §§ 922(g), 924(a)(2). The Armed Career Criminal Act provides, however, that such a defendant is subject to a mandatory minimum sentence of 15 years in prison if the defendant "has three previous convictions ... for a violent felony or a serious drug offense." 18 U.S.C. § 924(e)(1).

ACCA defines "violent felony" to include "burglary," which this Court has interpreted to refer to the generic offense of burglary, namely, "'unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.'" *Descamps* v. *United States*, 133 S. Ct. 2276, 2283 (2013) (quoting *Taylor* v. *United States*, 495 U.S. 575, 599 (1990)).

In *Taylor*, this Court addressed how a sentencing court should determine whether a defendant's prior conviction counts as a predicate offense under ACCA. The Court concluded that ACCA "mandates a formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." 495 U.S. at 600. By focusing on the crime of *conviction*, rather than the facts of the offense *committed*, the Court gave effect to Congress's intent, avoided serious constitutional questions with respect to the Sixth Amendment right to a jury trial, and prevented the "daunting" "practical difficulties and potential unfairness of a factual approach." *Id.* at 600-602; *see also Descamps*, 133 S. Ct. at 2287-2289.

Under the categorical approach as established in *Taylor*, courts "compare the elements of the statute forming the basis of the defendant's conviction with the elements of the 'generic' crime .... The prior conviction qualifies as an ACCA predicate only if the statute's elements are the same as, or narrower than, those of the generic offense." *Descamps*, 133 S. Ct. at 2281; *see also Taylor*, 495 U.S. at 599 ("If the state statute is narrower than the generic view ... there is no problem, because the conviction necessarily implies that the defendant has been found guilty of all the elements of generic burglary."). If the statute is broader than the generic offense, however—meaning that a conviction may

be obtained without proof or admission of all elements of the generic offense—then the conviction does not categorically qualify as an ACCA predicate, "even if the defendant actually committed the offense in its generic form." *Descamps*, 133 S. Ct. at 2283.

Criminal statutes sometimes define multiple offenses in a single statutory section by listing their distinguishing elements in the alternative. Such statutes are called "divisible." (A statute that does "not contain[] alternative elements," and thus creates only a single offense, is called "indivisible." *Descamps*, 133 S. Ct. at 2281-2282.) If "at least one, but not all of th[e] crimes" alternatively defined by a divisible statute "matches the generic version" of the offense, the statute is inconclusive for ACCA purposes, and "a court needs a way to find out which the defendant was convicted of" in order to determine whether the offense of conviction conforms to the generic offense. *Id.* at 2285; *see also Mellouli* v. *Lynch*, 135 S. Ct. 1980, 1986 n.4 (2015); *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1684 (2013); *Johnson* v. *United States*, 559 U.S. 133, 144 (2010); *Nijhawan* v. *Holder*, 557 U.S. 29, 35, 41 (2009). Sentencing courts use the "modified categorical approach" to do so. *Descamps*, 133 S. Ct. at 2281. Under that approach, "sentencing courts ... consult a limited class of documents"—often called *Shepard* documents, after *Shepard* v. *United States*, 544 U.S. 13 (2005)—"such as indictments and jury instructions, to determine which alternative formed the basis of the defendant's prior conviction" under a divisible statute. *Descamps*, 133 S. Ct. at 2281. If, after consulting these documents, the sentencing court is able to identify the crime of conviction, the court then does "what the categorical approach demands: compare the elements of the

crime of conviction ... with the elements of the generic crime." *Id.*

The "central feature" of the modified categorical approach, like the categorical approach itself, is "a focus on the elements, rather than the facts, of a crime." *Descamps*, 133 S. Ct. at 2285. In other words, a sentencing court may not consider *Shepard* documents to determine "what the defendant and state judge must have understood as the factual basis of the prior plea, or what the jury in a prior trial must have accepted as the theory of the crime." *Id.* at 2288 (internal quotation marks omitted). Rather, the court "may use the modified approach only to determine which alternative element in a divisible statute formed the basis of the defendant's conviction." *Id.* at 2293. "The modified approach thus acts not as an exception, but instead as a tool" for implementing the categorical approach. *Id.* at 2285.

B. District Court Proceedings

In 2014, Petitioner Richard Mathis pleaded guilty to one count of being a felon in possession of a firearm under 18 U.S.C. § 922(g)(1).[1] JA9. The parties jointly recommended that, but for the potential enhancement of his sentence under ACCA, Mr. Mathis should be sentenced to no more than seven years' imprisonment. JA51. The government, however, contended that ACCA's mandatory minimum sentence of 15 years should apply. The government's invocation of ACCA turned

---

[1] A loaded rifle and ammunition, which Mr. Mathis admitted were his, were found in his home during a police search that occurred following an accusation that Mr. Mathis had sexually abused a minor. JA8-9.

on prior convictions for burglary under Iowa law, one in 1981 and four in 1991.[2]

At the time of Mr. Mathis's 1991 burglary convictions, chapter 713 of the Iowa Criminal Code ("Burglary") provided:

> Any person, having intent to commit a felony, assault or theft therein, who, having no right, license or privilege to do so, enters *an occupied structure*, such occupied structure not being open to the public, or who remains therein after it is closed to the public or after the person's right, license or privilege to be there has expired, or any person having such intent who breaks an occupied structure, commits burglary.

---

[2] The government also relied on a prior conviction for "interference with official acts." The court of appeals stated that the district court had found that this conviction "constitutes one of the three predicate violent felonies required to apply the ACCA," and declined to "disturb this finding" on the ground that Mr. Mathis had not appealed it. JA11 n.2. In fact, the district court made no such finding, and instead found that Mr. Mathis is an armed career criminal on the basis of the burglary convictions alone. JA34-35. Moreover, the government argued at sentencing that the "interference with official acts" conviction qualified as a predicate offense under ACCA's so-called residual clause, JA27-28, which covered crimes that "otherwise involve[] conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. § 924(e)(2)(B)(ii), and which has since been held unconstitutionally vague, *Johnson* v. *United States*, 135 S. Ct. 2551 (2015). Mr. Mathis is entitled to the benefit of *Johnson* because it announced a new rule and his case is on direct review. *Schriro* v. *Summerlin*, 542 U.S. 348, 351 (2004); *Griffith* v. *Kentucky*, 479 U.S. 314, 328 (1987). Thus, there is significant doubt regarding whether Mr. Mathis's prior "interference with official acts" conviction qualifies as a predicate offense. In any event, the government's invocation of ACCA requires it to show that at least two, if not three, of Mr. Mathis's prior burglary convictions qualify as ACCA predicates.

Iowa Code § 713.1 (1989) (emphasis added).[3] A separate chapter of the Iowa Criminal Code ("Definitions") defined "occupied structure" to include "any building, structure, appurtenances to buildings and structures, *land, water or air vehicle, or similar place* adapted for overnight accommodation of persons, or occupied by persons for the purpose of carrying on business or other activity therein, or for the storage or safekeeping of anything of value." Iowa Code § 702.12 (1989) (emphasis added).

The parties agreed that, because Iowa law defined "occupied structure" to include not only buildings and structures but also vehicles, it swept more broadly than the generic burglary offense. *See Shepard*, 544 U.S. at 15-16 (ACCA "makes burglary a violent felony only if committed in a building or enclosed space ('generic burglary'), not in a boat or motor vehicle").[4] Accordingly, there was no dispute that the fact of Mr. Mathis's prior burglary convictions was insufficient to establish those convictions as ACCA predicates.

---

[3] The Iowa burglary statute was amended in 1984, but the change was immaterial to this case. Consistent with the parties' practice below, this brief refers to the 1989 version of the statute. *See* JA15 n.4.

[4] Iowa's burglary statute is also overbroad because it includes "appurtenances to buildings and structures." Iowa Code § 702.12. The Supreme Court of Iowa has "defined an 'appurtenance' broadly" to include curtilage, *State* v. *Pace*, 602 N.W.2d 764, 770 (Iowa 1999), such as driveways, *State* v. *Baker*, 560 N.W.2d 10, 13-14 (Iowa 1997), and fenced enclosures, *State* v. *Hill*, 449 N.W.2d 626, 627-628 (Iowa 1989). As this Court has explained, "the inclusion of curtilage takes ... burglary outside the definition of 'generic burglary' set forth in *Taylor*." *James* v. *United States*, 550 U.S. 192, 212 (2007).

The parties disagreed, however, about whether the sentencing court could use the modified categorical approach. The government argued that, because Iowa law defined "occupied structure" to encompass a list of alternatives, the burglary statute under which Mr. Mathis was convicted was divisible, such that the modified categorical approach could be used. The government submitted charging documents (trial informations) from Mr. Mathis's Iowa burglary prosecutions, but not plea agreements, plea colloquies, jury instructions, or verdict forms.[5] The Iowa charging documents accused Mr. Mathis of breaking into a "house and garage" (November 1980), JA60, a "garage" (June and July 1990), JA62; JA65, a "machine shed" (August 1990), JA68, and a "storage shed" (June 1991), JA71. Based on those factual allegations, the government argued that, in each case, Mr. Mathis had been convicted of burglarizing a "building," such that each prior conviction conformed to the generic burglary offense.

Mr. Mathis, by contrast, argued that the modified categorical approach was inapplicable because the Iowa burglary statute was indivisible. Mr. Mathis explained that a statute is divisible for ACCA purposes only if it sets out multiple offenses by listing alternative *elements*, one of which must be specifically charged by a prosecutor and agreed upon by a factfinder or admitted in a plea. Mr. Mathis argued that the relevant element of the Iowa burglary offense was that the place burglarized be an "occupied structure"—which is defined to sweep more broadly than the generic offense. The alternatives listed in the statutory definition of "occu-

---

[5] The record indicates that one of Mr. Mathis's prior burglary convictions was based on a guilty plea and that another was based on a jury verdict. The record is silent as to the mechanism by which his other burglary convictions were obtained. JA60-73.

pied structure," he argued, were merely illustrative examples of different *means* by which that element could be satisfied, not themselves elements of which one had to be found by a jury or admitted in a plea for a defendant to be convicted.

The district court agreed with the government and sentenced Mr. Mathis to ACCA's mandatory minimum of 15 years' imprisonment. The court first ruled that, because the Iowa Code "specifically refers to occupied structure and occupied structure can be a house, a business, and it can also be a boat or a car," the Iowa burglary statute qualified as divisible. JA34. Believing that use of the modified categorical approach was therefore proper, the court consulted the trial informations drafted by the state prosecutors in Mr. Mathis's prior cases. The district court ruled that "in each case Mr. Mathis was charged and convicted with entering an occupied structure to include the storage shed, machine shed, garage, or whatnot." JA34-35. Based on that conclusion, the court ruled that each of Mr. Mathis's prior burglary convictions "has all of the elements of generic burglary." JA34.[6]

C. Court Of Appeals Proceedings

The United States Court of Appeals for the Eighth Circuit affirmed. The court agreed with the parties that the Iowa Code "sweeps more broadly than generic burglary because [of its definition of] the term 'occupied structure.'" JA16-17. It then concluded that, because that definition listed alternatives, some of which

---

[6] Alternatively, the district court concluded that Mr. Mathis's prior burglary convictions qualified as violent felonies under ACCA's residual clause. JA35. Because the residual clause has since been held unconstitutional, *Johnson*, 135 S. Ct. 2551, the government no longer relies upon it. *See* U.S. Cert. Br. 3 n.1, 8 n.3.

"conform[] with generic burglary," the statute "exhibits the exact type of divisibility contemplated in *Taylor* and later solved in *Shepard*." JA17.

Although the court of appeals did not deny that a factfinder was not required to find (or a pleading defendant to admit) any particular "occupied structure" from the statutory list, and that the alternative "occupied structures" under Iowa law accordingly were simply different means of committing a single offense, the court rejected Mr. Mathis's argument that the statute was therefore indivisible. The court believed that the "means/elements distinction ... was explicitly rejected in *Descamps*." JA17. The court based that ruling on language in footnote 2 of *Descamps*, which it quoted as follows:

> "[w]hatever a statute lists (*whether elements or means*), the documents we approved in *Taylor* and *Shepard* ... would reflect the crime's elements. ... When a state law is drafted in the alternative, the court merely resorts to the approved documents and compares the elements revealed there to those of the generic offense."

JA17-18 (quoting *Descamps*, 133 S. Ct. at 2285 n.2) (emphasis and alterations by court of appeals). The court of appeals read this passage to establish that a statute that sets forth alternatives is invariably "divisible" and subject to the modified categorical approach, regardless of whether those alternatives "amount to alternative elements or merely alternative means to fulfilling an element." JA18-19.

Having ruled the modified categorical approach applicable, the court of appeals turned to the trial informations. Like the district court, the court of appeals concluded on the basis of the charging documents alone

that "Mathis was charged with and convicted of entering garages in relation to two of his burglary convictions." JA19. Declaring that "a garage is clearly a 'building,'" the court "f[ou]nd" that both of those convictions were "under the element of the Iowa burglary statute that conforms with generic burglary." *Id.* The court accordingly affirmed Mr. Mathis's 15-year mandatory minimum sentence. *Id.* Mr. Mathis's petition for rehearing and rehearing en banc was denied. JA22.

Mr. Mathis petitioned for certiorari because the court of appeals' approach conflicted with that of other circuits—a division that has only deepened since then. *See United States* v. *Lockett*, 810 F.3d 1262 (11th Cir. 2016) (supporting Mr. Mathis's argument); *Almanza-Arenas* v. *Lynch*, 809 F.3d 515 (9th Cir. 2015) (en banc) (same). After the government acquiesced in certiorari, this Court granted the petition.

SUMMARY OF ARGUMENT

A sentencing court may use the modified categorical approach only when the defendant was convicted under a divisible statute—that is, a statute that defines multiple offenses because it contains alternative elements. Because the Iowa burglary statute identifies only alternative means of committing a single offense, it is indivisible. The district court and court of appeals thus erred in applying the modified categorical approach.

I. Under ACCA, Congress has permitted sentencing courts to determine whether a prior conviction qualifies as a predicate offense by "'look[ing] only to the statutory definitions'—*i.e.*, the elements—of a defendant's prior offenses, and not 'to the particular facts underlying those convictions.'" *Descamps* v. *United*

States, 133 S. Ct. 2276, 2283 (2013). Thus, courts may apply the modified approach only "when a statute lists multiple, alternative elements, and so effectively creates 'several different ... crimes.'" *Id.* at 2285. "The modified approach does not authorize a sentencing court to substitute ... a facts-based inquiry for an elements-based one." *Id.* at 2293.

The court of appeals nonetheless read footnote 2 of *Descamps* to approve use of the modified categorical approach whenever a statute explicitly identifies alternative means. That reading fundamentally misunderstands footnote 2 and the reasoning of *Descamps* as a whole, and contravenes the longstanding principles on which *Descamps* relied.

The elements of a crime are fundamentally different from the means by which a crime is committed. Whereas elements define the crime and thus must be specifically charged and found by the jury, means refer to how an element has been satisfied and thus are "amplifying but legally extraneous circumstances," which need not be charged or found by the jury. *Descamps*, 133 S. Ct. at 2288; *see Schad* v. *Arizona*, 501 U.S. 624, 631-632 (1991) (plurality opinion). Accordingly, when a statutory list of alternatives refers only to means of committing the offense rather than elements of the crime, the offense remains "indivisible," and "the categorical approach needs no help from its modified partner." *Descamps*, 133 S. Ct. at 2286.

Indeed, the Court in *Descamps* explicitly rejected the suggestion that the existence of alternative means allowed use of the modified categorical approach. If a sentencing court could compare the means of commission to the generic ACCA offense, the court would merely be asking whether a particular set of facts con-

formed to the generic ACCA offense, "[a]nd that is what [this Court] ha[s] expressly and repeatedly forbidden." 133 S. Ct. at 2291. Footnote 2 simply explained that "distinguishing between 'alternative elements' and 'alternative means'"—a prerequisite to application of the modified categorical approach—would be a practicable task for sentencing courts. *Id.* at 2285 n.2.

Besides contravening ACCA itself, the court of appeals' approach would lead to violations of the Sixth Amendment right to a jury trial. Because the factual finding that a defendant has three ACCA predicate convictions "increases the penalty for a crime beyond the prescribed statutory maximum," the Sixth Amendment right attaches, *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000), and is violated unless the sentencing court bases its finding of a prior conviction solely on "those [facts] constituting *elements of the offense*," *Descamps*, 133 S. Ct. at 2288 (emphasis added).

Finally, the court of appeals' distinction between statutes that explicitly identify the means of commission and statutes that (like the one in *Descamps*) leave the means implicit only heightens the "daunting" "practical difficulties and potential unfairness" that led the Court to adopt the categorical approach in *Taylor* v. *United States*, 495 U.S. 575, 601 (1990). As with any other inquiry into the facts underlying a prior conviction, any inquiry into the means of commission will place an unwarranted burden on the sentencing court and risk leading the court to make inaccurate factual determinations. *Descamps*, 133 S. Ct. at 2289. The court of appeals' approach would also "deprive some defendants of the benefits of their negotiated plea deals," *id.*, lead to contradictory outcomes in indistinguishable cases, and complicate a defense attorney's strategic advice both in the original state criminal pro-

ceedings and in the subsequent federal proceedings in which ACCA could be applied.

II. Once the legal inquiry set forth in *Descamps* is correctly applied, it is plain that none of Mr. Mathis's burglary convictions qualifies as an ACCA predicate offense. Iowa's burglary statute—and specifically the term "occupied structure"—is not only overbroad (as all agree) but also indivisible, because the statutory list of alternative places identifies alternative means of satisfying a single, "broadly phrased ... element of place." *State* v. *Rooney*, 862 N.W.2d 367, 376 (Iowa 2015). Indeed, the Supreme Court of Iowa has held that the State may charge two different places alternatively and the jury need not agree on which place was burglarized. *State* v. *Duncan*, 312 N.W.2d 519, 522-523 (Iowa 1981). Furthermore, the final item in the statutory list is a "similar place," Iowa Code § 702.12, which confirms that the list collects illustrative means, not alternative elements. Mr. Mathis's prior Iowa burglary convictions thus do not conform to the generic burglary offense and do not qualify as predicate offenses under ACCA.

ARGUMENT

I. THE MODIFIED CATEGORICAL APPROACH DOES NOT APPLY WHERE THE STATUTE OF CONVICTION SETS FORTH ALTERNATIVE MEANS OF COMMITTING A SINGLE CRIME, RATHER THAN ALTERNATIVE ELEMENTS, WHICH DEFINE DIFFERENT CRIMES

A. ACCA Focuses On The Prior Conviction's Elements, Not Its Underlying Facts

ACCA provides a sentence enhancement for "a person who ... has three previous *convictions*" for specified violent felonies. 18 U.S.C. § 924(e)(1) (emphasis added); *see Taylor*, 495 U.S. at 600. And the Act de-

fines "violent felony" to include not only "any crime" that "is burglary," or other specified crimes, but also any crime that "has as an *element* the use ... of physical force." 18 U.S.C. § 924(e)(2)(B) (emphasis added). Given this context, the Court in *Taylor* interpreted the phrase "is burglary" to "refer[] to the *elements of the statute of conviction*, not to the facts of each defendant's conduct"—that is, not to what acts the person "has committed." 495 U.S. at 600-601 (emphasis added). In fact, the Court considered this "the only plausible interpretation of" ACCA's references to burglary and other predicate offenses. *Id.* at 602. Consequently, whether the sentencing court considers "the fact of conviction and the statutory definition of the prior offense," or considers certain record materials "beyond" those, the touchstone of the "formal categorical approach," the Court made clear, is whether "a jury was actually required to find all the elements of generic burglary." *Id.* at 600, 602.[7]

Since *Taylor*, the Court has consistently reaffirmed that an ACCA predicate conviction is identified by the legal elements of the offense, rather than the underlying facts in the defendant's particular case. For example, in *Shepard* v. *United States*, the Court noted ACCA's "language imposing the categorical approach, which refers to predicate offenses in terms not of prior conduct but of prior 'convictions' and the 'element[s]' of crimes," and the need to "avoid[] subsequent evidentiary enquiries into the factual basis for the earlier conviction." 544 U.S. 13, 19-20 (2005). "[A]pplying *Tay-*

---

[7] The Court's reading of ACCA was buttressed by the legislative history, which indicated that "Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions." *Taylor*, 495 U.S. at 600.

lor's categorical approach" in *James* v. *United States*, the Court remarked that it had "avoided any inquiry into the underlying facts of James' particular offense, and [had] looked solely to the elements of attempted burglary as defined by Florida law." 550 U.S. 192, 214 (2007).

Most recently in *Descamps*, the Court reiterated that, for ACCA purposes, "even if the defendant actually committed the offense in its generic form," "[t]he key ... is elements, not facts," and that the ultimate question under ACCA is whether "the jury [was] 'actually required to find all the elements of generic burglary.'" 133 S. Ct. at 2283-2284 (quoting *Taylor*, 495 U.S. at 602); *see also, e.g.*, *Descamps*, 133 S. Ct. at 2281 (under the "categorical approach[,] ... [t]he prior conviction qualifies as an ACCA predicate only if the statute's elements are the same as, or narrower than, those of the generic offense"). Further, the Court explained: "The modified categorical approach ... retains the categorical approach's central feature: a focus on the elements, rather than the facts, of a crime.... All the modified approach adds is a mechanism for making that comparison when a statute lists multiple, alternative elements, and so effectively creates several different ... crimes." *Id.* at 2285 (internal quotation marks omitted); *see also id.* at 2286 (A "court may look to the [*Shepard*] documents to determine which of the statutory *offenses* ... formed the basis of the defendant's conviction." (emphasis added)). "The modified approach," the Court declared, "does not authorize a sentencing court to substitute ... a facts-based inquiry for an elements-based one." *Id.* at 2293.

B. Means Are Legally Extraneous Facts, Not Elements

Means and elements are fundamentally different. Elements define a crime by establishing what circumstances must exist and what actions a person must take to be found guilty of the crime. *See, e.g.*, *Richardson* v. *United States*, 526 U.S. 813, 817 (1999) ("[C]rimes are made up of factual elements."); *Black's Law Dictionary* (10th ed. 2014) (defining "elements of crime" as "[t]he constituent parts of a crime—usu. consisting of the actus reus, mens rea, and causation—that the prosecution must prove to sustain a conviction").

A defendant cannot be convicted of a crime unless the government has proven each element beyond a reasonable doubt. *Richardson*, 526 U.S. at 817; *Patterson* v. *New York*, 432 U.S. 197, 210 (1977). And "when a statute lists multiple, alternative elements," it "effectively creates several different ... crimes." *Descamps*, 133 S. Ct. at 2285. In that circumstance, the jury must find that a particular alternative element was proven beyond a reasonable doubt before convicting the defendant of the corresponding alternative crime. *Id.* at 2290; *Richardson*, 526 U.S. at 817.

Accordingly, "[a]n indictment must set forth each element of the crime that it charges." *Almendarez-Torres* v. *United States*, 523 U.S. 224, 228 (1998); *see also Hamling* v. *United States*, 418 U.S. 87, 117 (1974) (an indictment must "contain[] the elements of the offense charged" to be sufficient); *United States* v. *Hess*, 124 U.S. 483, 486 (1888) ("No essential element of the crime can be omitted without destroying the whole pleading."). And if a defendant is to be charged under a statute containing alternative elements, the prosecutor "must generally select the relevant element from [the]

list of alternatives" to specify in the indictment, *Descamps*, 133 S. Ct. at 2290, because each count of the indictment must allege only a single offense, *cf. Braverman* v. *United States*, 317 U.S. 49, 54 (1942). "[A]n indictment or a criminal information which charges the person accused, in the disjunctive, with being guilty of one or of another of several offences, would be destitute of the necessary certainty, and would be wholly insufficient." *The Confiscation Cases*, 87 U.S. (20 Wall.) 92, 104 (1874).

Means, by contrast, refer to *how* a crime has been committed or an element satisfied. "Legislatures frequently enumerate alternative means of committing a crime without intending to define separate elements or separate crimes." *Schad* v. *Arizona*, 501 U.S. 624, 636 (1991) (plurality opinion). As the Eleventh Circuit recently explained in rejecting the approach taken by the Eighth Circuit in this case, a statute's list of alternatives could simply give illustrative examples of multiple ways in which a person could commit a single offense. *See United States* v. *Lockett*, 810 F.3d 1262, 1268 (11th Cir. 2016) ("[I]llustrative examples are not alternative elements." (internal quotation marks omitted)). Or the list of alternatives might "create alternative definitions of indeterminate language." *Id.* For example, in *Schad*, the Court considered a first-degree murder statute that the Supreme Court of Arizona had interpreted as identifying felony-murder and premeditated murder as two "means of satisfying a single *mens rea* element." 501 U.S. at 637 (plurality opinion).

Thus, a statute listing alternative means still defines only a single crime. *See Schad*, 501 U.S. at 636 (plurality opinion) (a State may determine that "statutory alternatives are mere means of committing *a single offense*" (emphasis added)); *Sanabria* v. *United*

States, 437 U.S. 54, 66 n.20 (1978) ("A single offense should normally be charged in one count rather than several, even if different means of committing the offense are alleged."). Means may or may not be specified in the indictment, but unlike elements, they need not be—the indictment need contain only facts sufficient to fairly inform the defendant of the charge against him and to enable the defendant "to plead an acquittal or conviction [as a] bar of future prosecutions for the same offense." *Hamling*, 418 U.S. at 117.[8]

Where an indictment does specify the means of a charged crime, it might do so in the alternative, for instance if a coroner is unable to determine whether a victim was killed by burning or strangling. Because the specific means of the homicide need not be proved, alternative charging is permitted. *See Schad*, 501 U.S. at 631 (plurality opinion); *id.* at 650 (Scalia, J., concurring); Fed. R. Crim. P. 7(c)(1) ("A count may allege that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means.").

Further, a jury need not agree on the means by which the defendant committed a crime, *i.e.*, on *how* any particular element was satisfied. *Schad*, 501 U.S. at 631-632 (plurality opinion) (jury need not agree on whether defendant committed first-degree murder through premeditation or felony murder, which Arizona law defined as alternative means). For example,

---

[8] For example, this Court has held that an indictment for illegal reentry need not state the means by which a noncitizen attempted to reenter the United States, as long as the indictment sufficiently informs the defendant of the charge by specifying the time and place of the attempt. *United States* v. *Resendiz-Ponce*, 549 U.S. 102, 103-111 (2007).

> [w]here ... an element of robbery is force or the threat of force, some jurors might conclude that the defendant used a knife to create the threat; others might conclude he used a gun. But that disagreement—a disagreement about means—would not matter as long as all 12 jurors unanimously concluded that the Government had proved the necessary related element, namely, that the defendant had threatened force.

Richardson, 526 U.S. at 817. This rule applies not only to jury verdicts, but also to plea colloquies and written plea agreements. A guilty plea "is an admission of all the *elements* of a formal criminal charge," *McCarthy* v. *United States*, 394 U.S. 459, 466 (1969) (emphasis added), but not of extraneous facts about the crime, even if they are included in the charging document, *Descamps*, 133 S. Ct. at 2288.

C. As The Court Recognized In *Descamps*, A Statute Listing Alternative Means Rather Than Alternative Elements Is Indivisible And Does Not Trigger The Modified Categorical Approach

Because means are legally extraneous facts, a criminal statute's listing of alternative means of committing an offense does not authorize use of the modified categorical approach for ACCA purposes. This conclusion follows directly from the basic principle—articulated in *Taylor*, *Shepard*, and *Descamps*—that ACCA predicate convictions are defined by their elements, not by the conduct that was the basis of the conviction.

Notably, the Court in *Descamps* explicitly rejected the suggestion that the existence of alternative means allowed use of the modified categorical approach. At issue in *Descamps* was whether the modified categori-

cal approach could be used in connection with an overbroad California statute that contained *no* list of alternatives. The Ninth Circuit had approved the use of the modified categorical approach because, it said, the California statute "creates an implied list of every means of commission that otherwise fits the definition of a given crime." 133 S. Ct. at 2289 (emphasis omitted). Reversing the Ninth Circuit, this Court explained that the modified categorical approach did not apply because "[t]he jurors need not all agree on whether the defendant used" a particular means to commit the crime (*e.g.*, "a gun or a knife or a tire iron"). *Id.* at 2290. "Indeed," this Court said, "accepting the Ninth Circuit's contrary reasoning would altogether collapse the distinction between a categorical and a fact-specific approach":

> If a sentencing court, as the Ninth Circuit holds, can compare each of those "implied ... means of commission" to the generic ACCA offense, ... then the categorical approach is at an end. At that point, the court is merely asking whether a particular set of facts leading to a conviction conforms to a generic ACCA offense. And that is what we have expressly and repeatedly forbidden.

Id. at 2290-2291. As this passage demonstrates, "means" is simply another word for what this Court has called "a non-elemental fact," *id.* at 2289; the presence of alternative means of committing a single crime is accordingly not a valid basis for using the modified categorical approach.

In this case, however, the Eighth Circuit read footnote 2 of *Descamps* to limit that reasoning to statutes in which the different possible means of commission are implicit, *i.e.*, unstated, while otherwise approving use of

the modified categorical approach when (as here) alternative means are specifically recited in a state statute. That reading contravenes footnote 2, *Descamps* as a whole, and the longstanding principles on which *Descamps* relied.

Footnote 2 of *Descamps*, which responds to objections raised by the dissent, reinforces the distinction between alternative means and alternative elements, even where the alternatives are stated explicitly in the statute. Indeed, a principal disagreement between the Court and the dissent was whether the state laws in *Taylor*, *Shepard*, and *Johnson* "set out 'merely alternative means, not alternative elements' of an offense." 133 S. Ct. at 2285 n.2. The Court concluded that "[a]ll those decisions rested on the explicit premise that the laws 'contain[ed] statutory phrases that cover several different ... crimes,' not several different methods of committing one offense." *Id.* The Court considered it important that its prior decisions finding statutes "divisible" were premised on the conclusion that those statutes' explicit lists of alternatives referred to elements, not means. That discussion would have been unnecessary and inexplicable if, as the court of appeals ruled here, a list of alternative means had the same effect under ACCA as a list of alternative elements.

The court of appeals justified its ruling by disregarding the beginning of footnote 2 and relying entirely on the footnote's final two sentences. That was erroneous not only because lower courts are not free to pick and choose which parts of this Court's decisions to heed, but also because the second half of footnote 2, even standing alone, does not mean what the court of appeals thought it did. That passage responded to the dissent's concern that "distinguishing between 'alternative elements' and 'alternative means' is difficult." 133

S. Ct. at 2285 n.2. Rather than saying—as the court of appeals said in this case—that the distinction does not matter at all, the Court responded that ascertaining whether a statutory list of alternatives identifies means or elements would be practicable, and suggested that the *Shepard* documents might be useful for this limited and antecedent purpose, to the extent that they "would reflect the crime's *elements*." *Id.* (emphasis added); *see also id.* ("the court merely resorts to the approved documents and compares the *elements* revealed there to those of the generic offense" (emphasis added)).[9] Thus, even the two sentences relied upon by the court of appeals emphasize the importance of identifying the *elements* of the prior offense—not the *means* by which it was committed—because the categorical approach and its "modified version" are limited to comparing those *elements* to the generic offense.

Indeed, there is no reason why the ultimate question whether a prior conviction conforms to the generic offense should turn on whether alternative *means* are explicit or implicit in the statute of conviction. Explicit or implicit, means still are not elements, still do not define different offenses, and still refer only to factual circumstances that the prosecution was not required to prove and the jury was not required to find (or the de-

---

[9] As is discussed further below (pp. 28-29, 36 n.14), given the variability of charging practices across jurisdictions and the frequent inscrutability of *Shepard* documents, the Court likely had in mind that such documents could be helpful, if at all, as a rule of exclusion, *i.e.*, to establish that the statute of conviction was *indivisible*, such as where the documents charge the alternatives in the disjunctive, thus confirming that the alternatives must be means, not elements. *See The Confiscation Cases*, 87 U.S. (20 Wall.) at 104; *Almanza-Arenas* v. *Lynch*, 809 F.3d 515, 524-525, 527 (9th Cir. 2015) (en banc) (confirming the court's determination that a statute is indivisible by examining *Shepard* documents).

fendant was not required to admit as part of a plea). *See, e.g., Schad*, 501 U.S. at 631-632 (plurality opinion) (jury need not agree on alternative means of committing first-degree murder, even where alternatives were explicitly listed in the statute). Using the modified categorical approach to ascertain the means that formed the basis of the conviction is no more relevant or appropriate under ACCA than a sentencing judge asking the defendant what he did, or holding a new trial to answer that question. *Descamps*, 133 S. Ct. at 2286 ("Whether Descamps *did* break and enter makes no difference. And likewise, whether he ever admitted to breaking and entering is irrelevant."). The presence of alternative means expressly identified in the statute does not make those inquiries any more appropriate.[10]

D. Using The Modified Categorical Approach To Analyze Convictions Under Statutes Listing Alternative Means Would Raise Serious Constitutional And Practical Difficulties

The court of appeals' use of the modified categorical approach in situations where a statute sets out a single offense with alternative means of commission, rather than multiple offenses created by alternative elements, improperly "turn[ed] an elements-based inquiry into an

---

[10] The courts of appeals that have considered footnote 2 of *Descamps* in its entirety have agreed that the footnote does not eliminate the distinction between elements and means, but rather explains that distinguishing between them will not be difficult. *See Almanza-Arenas*, 809 F.3d at 526-528; *Rendon* v. *Holder*, 764 F.3d 1077, 1086 n.10 (9th Cir. 2014); *see also Omargharib* v. *Holder*, 775 F.3d 192, 201 (4th Cir. 2014) (Niemeyer, J., concurring). The courts that have come to the opposite conclusion have—like the Eighth Circuit below—generally only considered the footnote's final two sentences in isolation. *See United States* v. *Trent*, 767 F.3d 1046, 1060-1061 (10th Cir. 2014).

evidence-based one." *Descamps*, 133 S. Ct. at 2287. Besides contravening ACCA itself (as just explained), the court of appeals' approach raises serious constitutional questions and creates practical difficulties and potential unfairness—all reasons that have led the Court to reject a facts-based inquiry under ACCA.

1. The court of appeals' approach jeopardizes defendants' Sixth Amendment right to a jury trial

Concern about sentencing courts impinging upon defendants' Sixth Amendment rights has motivated the Court to construe ACCA to require a categorical, elements-based approach since *Taylor*. 495 U.S. at 601. The court of appeals' decision revives that very concern.

The Sixth Amendment requires that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. "Under ACCA, the court's finding of a predicate offense indisputably increases the maximum penalty. Accordingly, that finding would (at the least) raise serious Sixth Amendment concerns if it went beyond merely identifying a prior conviction." *Descamps*, 133 S. Ct. at 2288.[11]

Critically, the Sixth Amendment exception for the fact of a prior conviction allows a sentence enhance-

---

[11] Determining whether a prior conviction qualifies as an ACCA predicate also raises Sixth Amendment concerns because it increases the mandatory *minimum* sentence. *Alleyne* v. *United States*, 133 S. Ct. 2151, 2155 (2013) ("any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury").

ment only on the basis of the *elements* of the prior conviction, because "the only facts the court can be sure the jury ... found," or the defendant admitted by plea, "are those constituting elements of the offense—as distinct from amplifying but legally extraneous circumstances." *Descamps*, 133 S. Ct. at 2288. Thus, in *Descamps*, the Court held that the lower court had erred "when [it] enhanced Descamps' sentence, based on his supposed acquiescence to a prosecutorial statement ... irrelevant to the crime charged," *i.e.*, a "non-elemental fact." *Id.* at 2288-2289. Doing so "extend[s] judicial factfinding beyond the recognition of a prior conviction," which cannot be reconciled with the Sixth Amendment. *Id.* at 2288; *cf. James*, 550 U.S. at 214 (by "avoid[ing] any inquiry into the underlying facts of James' particular offense, and ... look[ing] solely to the elements of attempted burglary as defined by Florida law," the categorical approach "raises no Sixth Amendment issue").

Descamps' constitutional analysis has equal force regardless of whether the means of committing the offense are implied by the statute (as in *Descamps*) or expressly stated (as here). Either way, the means is a "non-elemental fact," an "amplifying but legally extraneous circumstance[]," and a sentencing court commits constitutional error by enhancing a sentence beyond the statutory maximum on the basis of a fact that *it* has found. 133 S. Ct. at 2288-2289.

2. The court of appeals' approach raises serious practical and fairness concerns

In *Taylor*, this Court also noted the advantage of the categorical approach in avoiding the "daunting" "practical difficulties and potential unfairness of a factual approach." *Taylor*, 495 U.S. at 601; *see also*

Descamps, 133 S. Ct. at 2289. The court of appeals' approach revives those concerns as well.

Like any other inquiry into the facts underlying a conviction, inquiry into the means of commission will often have a high cost and a low return. On the one hand, substantial resources will have to be expended "examining (often aged) documents for evidence that a defendant admitted in a plea colloquy, or a prosecutor showed at trial, facts that, although unnecessary to the crime of conviction, satisfy an element of the relevant generic offense." *Descamps*, 133 S. Ct. at 2289. On the other hand, "[t]he meaning of those documents will often be uncertain. And the statements of fact in them may be downright wrong." *Id.* That is because (as noted above) charging instruments, jury verdicts, and plea agreements need not specify particular means of commission, and when such documents do specify means, defendants "often ha[ve] little incentive to contest facts that are not elements of the charged offense—and may have good reason not to." *Id.*; *see also id.* at 2293 (Kennedy, J., concurring) ("[C]ertain facts in the documents approved for judicial examination in *Shepard* ... may go uncontested because they do not alter the sentencing consequences of the crime[.]").

This case vividly illustrates the danger of using such documents to qualify a defendant for an ACCA enhancement. The only potentially relevant *Shepard* documents in the record relating to Mr. Mathis's prior burglary convictions are *charging* documents drafted by state prosecutors. No record materials demonstrate that a factfinder ever found or Mr. Mathis ever assented to the facts they allege. Certainly without "records made or used in adjudicating guilt"—jury instructions, verdict forms, plea agreements, transcripts of plea colloquies—and sometimes even with such records, the

charging documents cannot meet "*Taylor*'s demand for certainty when identifying a generic offense." *Shepard*, 544 U.S. at 21; *see Taylor*, 495 U.S. at 602 (prior conviction qualifies as ACCA predicate if "the charging paper *and jury instructions* actually required the jury to find all the elements of generic burglary in order to convict the defendant" (emphasis added)). The charging documents from Mr. Mathis's prior cases are especially prone to being misleading or inaccurate because Iowa law allows the State to amend the charges before and during trial, Iowa Ct. R. 2.4(8)(a); *see also id.* at 2.5(5), and—at the time of Mr. Mathis's first burglary conviction—even after trial, *State* v. *Berney*, 378 N.W.2d 915, 918-919 (Iowa 1985), *overruled by State* v. *Bruce*, 795 N.W.2d 1 (Iowa 2011). Iowa also allows *Alford* pleas, which would have permitted Mr. Mathis to plead guilty without admitting the facts underlying the crime. *See State* v. *Klawonn*, 609 N.W.2d 515, 520 (Iowa 2000) ("We first recognized the *Alford* plea in *Young* v. *Brewer*, 190 N.W.2d 434, 438 (Iowa 1971)."). Thus, the *Shepard* documents marshaled by the government in this case offer no assurance about the facts underlying Mr. Mathis's burglary convictions and, more importantly, do not confirm that Mr. Mathis was "necessarily" convicted based on "facts equating to generic burglary." *Shepard*, 544 U.S. at 24.

"Still worse, the [court of appeals'] approach will deprive some defendants of the benefits of their negotiated plea deals." *Descamps*, 133 S. Ct. at 2289. This Court has recognized that a facts-based approach would invite the possibility of a defendant "plead[ing] guilty to a less serious crime, whose elements do not match an ACCA offense," and then being "treat[ed by a federal sentencing court] as though he had pleaded to" a more serious crime, which is "an ACCA predicate, based on

legally extraneous statements found in the old record." *Id.* The same unfairness can occur under the court of appeals' approach, even where factfinding about the means of commission is limited to statutes that explicitly list alternative means of commission.

For example, in Alabama, first-degree burglary prohibits "enter[ing] or remain[ing] unlawfully in a dwelling." Ala. Code § 13A-7-5(a). Third-degree burglary, however, requires only "enter[ing] or remain[ing] unlawfully in a building," which is defined by statute to include vehicles as well as dwellings. Ala. Code §§ 13A-7-1(2), 13A-7-7(a); *see Green* v. *State*, 424 So. 2d 704, 705 (Ala. Crim. App. 1982) (the elements of third-degree burglary are "(1) knowingly entering or remaining unlawfully in a building and (2) intent to commit a crime therein"). Thus, an Alabama conviction for first-degree burglary would necessarily fall within the scope of generic burglary, while a conviction for third-degree burglary would not (because it could involve burglary of a vehicle). Under the court of appeals' approach, however, a defendant who pleaded guilty to the lesser Alabama offense of third-degree burglary could nonetheless be sentenced under ACCA as if he had pleaded guilty to first-degree burglary if his charging document or plea agreement happened to mention (unnecessarily) that he had broken into a dwelling. *Cf. United States* v. *Howard*, 742 F.3d 1334, 1348-1349 (11th Cir. 2014) (finding Alabama's third-degree burglary statute overbroad and indivisible for ACCA purposes).

Using the modified categorical approach where a statute lists alternative means will also lead to unjustifiable disparities between States that define an offense in the exact same way. *See Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1693 n.11 (2013) (under elements-based ap-

proach, "defendants whose convictions establish the same facts will be treated consistently, and thus predictably, under federal law. This was *Taylor*'s chief concern in adopting the categorical approach."). Consider two States that both create a single crime of burglary of a structure, which can be committed through unlawful entry of a building or a vehicle. State A has done so by codifying a statutory definition of "structure" that lists buildings and vehicles. State B reached the same result through judicial interpretation of the term "structure" in the burglary statute. Although burglary has the same scope in both States, the court of appeals' approach would produce different results, with the modified categorical approach being available in cases from State A but not in cases from State B. There is no doctrinal reason for such a disparity.[12]

Finally, the court of appeals' approach significantly complicates a defense attorney's strategic advice and decisionmaking regarding charging documents, jury instructions, and plea agreements. *See Padilla* v. *Kentucky*, 559 U.S. 356, 364-366 (2010) (before deciding to plead guilty, a defendant is entitled to "effective assistance of competent counsel," including advice about the consequences of a conviction). Counsel representing a

---

[12] Relatedly, this Court's elements-based approach affords due respect to state decisions about how to define crimes. For example, this Court has already concluded that Massachusetts' burglary statute is "divisible" because it sets forth alternative elements. *Descamps*, 133 S. Ct. at 2284. Other States might choose to set forth alternative means and define the elements of their burglary statutes more broadly—as is the case in Iowa, *see infra* Part II—which will make burglary easier to prosecute in state court, but will also mean that convictions do not serve as ACCA predicates. The choice of how to define state crimes is one for States to make, and this Court's adoption of the elements-based approach ensures that state choices will be respected in federal court.

defendant in a state prosecution could not predict whether a future federal sentencing court might read ambiguous *Shepard* documents as demonstrating a means of commission that, though completely irrelevant in the state plea proceeding, could dramatically alter a federal sentence under ACCA. For the same reasons, the court of appeals' facts-based approach makes it difficult for an attorney to advise her client about the consequences of a felon-in-possession conviction under 18 U.S.C. § 922(g); three prior convictions for overbroad offenses may or may not qualify the defendant for the sentence enhancement of § 924(e), depending on what facts a state prosecutor happened to mention in a charging document or elsewhere during the proceedings decades earlier. By contrast, an elements-based inquiry is predictable: any given offense either will or will not qualify as an ACCA predicate in all circumstances—that is the advantage of a categorical approach. *Descamps*, 133 S. Ct. at 2287 ("Congress ... meant ACCA to function as an on-off switch, directing that a prior crime would qualify as a predicate offense in all cases or in none."); *see also Mellouli* v. *Lynch*, 135 S. Ct. 1980, 1987 (2015) ("[T]he [categorical] approach enables aliens to anticipate the immigration consequences of guilty pleas in criminal court, and to enter 'safe harbor' guilty pleas [that] do not expose the [alien defendant] to the risk of immigration sanctions." (internal quotation marks omitted; alterations in original)).

Accordingly, the court of appeals was wrong to disregard the difference between means and elements when considering whether the Iowa burglary statute was divisible. As the remainder of this brief shows, the correct elements-based analysis compels the conclusion that the statute is *indivisible* and the modified categorical approach inappropriate in this case.

II. IOWA'S OVERBROAD BURGLARY CRIME IS INDIVISIBLE, SO THE MODIFIED CATEGORICAL APPROACH DOES NOT APPLY

Iowa's burglary statute is indivisible because the statutory list of alternative places sets forth means of commission that merely illustrate the kinds of places that would satisfy the single "occupied structure" element; they are not separate elements denoting separate burglary offenses. This conclusion follows from the fact that the State need not prove, and the jury need not find, that any particular kind of place was burglarized.

A person commits burglary under Iowa law by, among other things, unlawfully "enter[ing] an occupied structure[.]" Iowa Code § 713.1. "Occupied structure" is not defined in Section 713.1; instead, that term is subject to a general statutory definition contained in Iowa Code § 702.12, which defines the term "occupied structure" to include land, water, and air vehicles. In determining whether the alternative places listed in Section 702.12 are elements or means, decisions of the Supreme Court of Iowa are binding. *See Johnson* v. *United States*, 559 U.S. 133, 138 (2010) ("We are ... bound by the Florida Supreme Court's interpretation of state law, including its determination of the elements" of the State's battery statute); *Schad*, 501 U.S. at 636 (plurality opinion) ("If a State's courts have determined that certain statutory alternatives are mere means of committing a single offense, rather than independent elements of the crime, we simply are not at liberty to ignore that determination and conclude that the alternatives are, in fact, independent elements under state law."); *Mullaney* v. *Wilbur*, 421 U.S. 684, 689-691 (1975) (Maine Supreme Judicial Court's decision that murder and manslaughter are alternative means of committing

the single crime of felonious homicide is a binding construction of Maine law); *Murdock* v. *City of Memphis*, 87 U.S. (20 Wall.) 590, 626 (1875) ("The State courts are the appropriate tribunals ... for the decision of questions arising under their local law, whether statutory or otherwise.").

The Supreme Court of Iowa has ruled that the "occupied structure" language of Iowa's burglary law requires the State to prove "two independent elements ..., one related to place and the second related to activity, purpose, or use." *State* v. *Rooney*, 862 N.W.2d 367, 376 (Iowa 2015). The court elaborated that the statutory phrase "any building, structure, appurtenances to buildings and structures, land, water or air vehicle, or similar place" identifies alternative means of satisfying a single, "broadly phrased ... element of place." *Id.* at 372, 376; *see also State* v. *Pace*, 602 N.W.2d 764, 769 (Iowa 1999) ("[O]ur definition of an occupied structure has two prongs. The first describes the type of place that can be the subject of burglary, and the second considers its purpose or use."); *State* v. *Sanford*, 814 N.W.2d 611, 616 (Iowa 2012) ("'any building, structure, appurtenances to buildings and structures, land, water or air vehicle, or similar place' satisfies the first prong").[13] Consequently, the Supreme Court of Iowa has "found the element satisfied in a wide variety of contexts." *Rooney*, 862 N.W.2d at 376.

---

[13] The "activity or purpose" element is defined by the balance of the statutory definition of "occupied structure," *i.e.*, "adapted for overnight accommodation of persons, or occupied by persons for the purpose of carrying on business or other activity therein, or for the storage or safekeeping of anything of value." Iowa Code § 702.12.

Even more tellingly, the Supreme Court of Iowa has held that, under the Iowa burglary law, two different places "could be charged ... alternatively and could be correspondingly submitted to the jury," and that "[i]f substantial evidence is presented to support each alternative *method of committing a single crime*"—*i.e.*, the different places charged—"and the alternatives are not repugnant to each other, then unanimity of the jury as to the *mode of commission of the crime* is not required." *State* v. *Duncan*, 312 N.W.2d 519, 522-523 (Iowa 1981) (emphases added; internal quotation marks omitted); *see also State* v. *Bratthauer*, 354 N.W.2d 774, 776 (Iowa 1984) ("*Duncan* ... reject[ed] defendant's contention that the trial court erred in permitting the jury to convict the defendant of burglary based on alternative theories of burglary of a marina and burglary of a boat in the marina."). The Supreme Court of Iowa not only described the places with language equivalent to this Court's phrase "means of committing"—"method" and "mode of commission"—but it also approved of charging practices that, as explained above, are constitutionally permissible only if the different places are means rather than elements. *See supra* Part I.B.

Indeed, the text of the definitional provision would scarcely permit treating the listed places as elements of separate offenses. The final item listed in the series of places is a "similar place" (Iowa Code § 702.12)—not a distinct and definite category of place into which the location of the burglary could be fit, but rather a catchall, indicating that the list collects illustrative means, not a finite list of alternative elements. *See Howard*, 742 F.3d at 1348-1349 (finding statute indi-

visible because the word "includes" introduced a list of "non-exhaustive examples").[14]

Because the Iowa burglary statute sets forth a single offense, not multiple offenses defined by alternative elements, the court of appeals erred in finding the statute of Mr. Mathis's conviction divisible and in applying the modified categorical approach. And because Iowa's single burglary offense undisputedly permits conviction in more situations than generic burglary, it is categorically not a valid ACCA predicate offense. Mr. Mathis accordingly should not have been sentenced under ACCA.

---

[14] The *Shepard* documents the government proffered from Mr. Mathis's prior burglary convictions are inconclusive on this issue. *See* JA60; JA62; JA65; JA68; JA71. This is unsurprising. *Shepard* documents will regularly fail to answer definitively whether statutory alternatives are elements or means. "[P]rosecutors' charging documents do not always charge a defendant properly." *Almanza-Arenas*, 809 F.3d at 524 n.13. Similarly, jury instructions or other *Shepard* documents may sometimes be erroneous. *See Musacchio* v. *United States*, 136 S. Ct. 709, 713-714 (2016) (jury instruction erroneously added an element not required by law). Thus, to the extent this Court allows sentencing courts to consult *Shepard* documents to determine whether statutory alternatives are elements or means, courts must do so cautiously, and certainly not accord them greater weight than other sources of authoritative state law.

CONCLUSION

The judgment of the court of appeals should be reversed, Mr. Mathis's sentence vacated, and the case remanded.

Respectfully submitted,

JAMES WHALEN
FEDERAL PUBLIC
DEFENDER'S OFFICE
Capital Square, Suite 340
400 Locust Street
Des Moines, IA 50309

DAVID M. LEHN
JOSHUA M. KOPPEL
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave. NW
Washington, DC 20006

MARK C. FLEMING
Counsel of Record
ERIC F. FLETCHER
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
mark.fleming@wilmerhale.com

ALAN E. SCHOENFELD
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich St.
New York, NY 10007

FEBRUARY 2016

APPENDIX

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924. Penalties

* * *

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection--

(A) the term "serious drug offense" means--

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or

carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that–

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

Iowa Code § 702.12 (1989). Occupied structure.

An "*occupied structure*" is any building, structure, appurtenances to buildings and structures, land, water or air vehicle, or similar place adapted for overnight accommodation of persons, or occupied by persons for the purpose of carrying on business or other activity therein, or for the storage or safekeeping of anything of value. Such a structure is an "occupied structure" whether or not a person is actually present. However, for purposes of chapter 713, a box, chest, safe, changer, or other object or device which is adapted or used for the deposit or storage of anything of value but which is too small or not designed to allow a person to physically enter or occupy it is not an "occupied structure"

Iowa Code § 713.1 (1989). Burglary defined.

Any person, having the intent to commit a felony, assault or theft therein, who, having no right, license or privilege to do so, enters an occupied structure, such occupied structure not being open to the public, or who remains therein after it is closed to the public or after

the person's right, license or privilege to be there has expired, or any person having such intent who breaks an occupied structure, commits burglary.